RHB Bank Bhd v Malaysian International Trading Corp Sdn Bhd

A

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL/APPEAL NO W-03(IM)-30–13 OF 2014
DAVID WONG, ZAWAWI SALLEH AND VARGHESE GEORGE JJCA
3 OCTOBER 2014

C

Banking — Security for advances — Illegal monies — Monies in fixed deposit accounts pledged with bank as security — Monies obtained from illegal sources — Whether bank a bona fide recipient for value and without notice — Whether bank rights over the security affected by depositor's illegal conduct — Whether obligation on bank to ascertain source of monies deposited with them

D

Civil Procedure — Execution — Garnishee proceedings — Debt due — Whether debt due — Application to garnish monies in fixed deposit accounts pledged with bank as security — Whether garnishment to be allowed

E

Civil Procedure — Res judicata — Whether applicable — Appellant not a party to earlier suit — Earlier suit involving different issue or cause of action — Whether principle of res judicata applicable

F

The appellant had granted banking facilities to the judgment debtor ('JD') and as part of securities, monies in six fixed deposit accounts ('the six deposit accounts') were pledged with the appellant in June 1999. Sometime in 2000, the respondent sued the JD in the Singapore High Court relating to a massive fraud perpetrated by the JD on the respondent. The respondent obtained judgment in the sum of US$79m against the JD. The Singapore High Court found that the monies in the RHB bank accounts were held by the JD on trust for the respondent. The Singapore judgment referred to and encompassed the six fixed deposit accounts sought to be garnished in the appellant. The respondent applied for an order that all monies owed by the appellant to the JD be garnished and be used for payment of the debt due under the Singapore judgment. The appellant in exercise of their right of set-off proceeded to uplift six deposit accounts and utilised the same to pay off the JD's debt due to the appellant. The senior assistant registrar granted a garnishee order absolute. The appellant's appeal against that decision was dismissed by the learned High Court judge. The appellant thus filed this appeal against the decision of the learned High Court judge. The JD himself had applied to set aside the garnishee orders to show cause but the application was dismissed by Lau Bee Lan J. The respondent made two points, namely, the appellant's failure in

G

H

I

intervening in the JD's application to set aside the garnishee order to show cause and the effect of the Singapore judgment. The respondent claimed that the appellant was bound by the principle of res judicata. The issue arising was whether the appellant should be bound by the Singapore judgment in that as the monies in the six deposit accounts were tainted with illegality, the appellant's letter of pledge was also tainted.

Held, allowing the appeal with costs:

(1) The appellant had no duty to intervene in the application before Lau Bee Lan J as the dispute before her was between the respondent and the JD and was premised on the Singapore judgment which the appellant was not a party. Secondly, the issue or cause of action between the appellant and the respondent was different to that before Her Ladyship. The issue between the appellant and respondent was premised on the letter of set-off and did not concern as to whether the JD held the garnished accounts on trust for the respondent. Hence, the principle of res judicata did not apply (see para 19).

(2) The appellant was not a party to the Singapore suit. There was no evidence whatsoever that the appellant was aware that the monies in the six deposit accounts were from bribes and obtained fraudulently by the JD. Hence, the appellant was in a position of a 'bona fide recipient for value and without notice' and its rights to the monies in the six deposit accounts could not be affected by the JD's illegal conducts (see para 21).

(3) There is no legislation or case law which requires banks like the appellant to ascertain as to the source of the monies which their customers bring in. Thus, the appellant could not be imposed of such duty to enquire or investigate as to the source of the monies of the JD (see paras 22–23).

(4) The relationship between the JD and the appellant was construed in the context of a banking facility granted by a bank to its customer and as security the JD was required to pledge his six deposit accounts with the appellant. The intention was quite clear and that was, the JD could not uplift the six deposit accounts before the full repayment of the banking facility unless the appellant consented to the uplifting (see para 32).

(5) The JD's interests in the six deposit accounts were conditional upon the full repayment of the banking facility, which was still owing at the material time. He thus had no claim on the monies in the six deposit accounts and when the respondent stepped in his shoes as the JD, it too had no claim on those monies (see para 33).

[Bahasa Malaysia summary

Perayu telah memberikan fasiliti perbankan kepada penghutang penghakiman ('JD') dan sebagai sekuriti, wang dalam enam akaun tetap ('enam akaun

deposit') disandarkan kepada perayu pada Jun 1999. Kira-kira tahun 2000, responden menyaman JD di Mahkamah Tinggi Singapura atas penipuan besar yang dilakukan oleh JD terhadap responden. Responden mendapat penghakiman berjumlah US$79 juta terhadap JD. Mahkamah Tinggi Singapura mendapati bahawa wang dalam akaun bank RHB dipegang oleh JD sebagai amanah bagi responden. Penghakiman Singapura merujuk dan meliputi enam akaun deposit digarnis kepada perayu. Responden memohon bagi perintah bahawa kesemua wang yang dihutang oleh perayu kepada JD digarnis dan digunakan bagi bayaran hutang tertunggak di bawah penghakiman Singapura. Perayu, dalam menjalankan haknya untuk penolakan meneruskan untuk menyingkap enam akaun deposit tersebut dan menggunakannya untuk membayar hutang tertunggak yang terhutang kepada perayu. Penolong kanan pendaftar memberi perintah garnis mutlak. Rayuan perayu terhadap keputusan tersebut ditolak oleh hakim Mahkamah Tinggi. Oleh itu, perayu memfailkan rayuan ini terhadap keputusan hakim Mahkamah Tinggi. JD sendiri telah memohon untuk mengenepikan perintah garnis untuk tunjuk sebab tetapi permohonan tersebut ditolak oleh Lau Bee Lan H. Responden mengutarakan dua perkara, iaitu, kegagalan perayu dalam campur tangan permohonan JD untuk mengenepikan perintah garnis untuk tunjuk sebab dan kesan penghakiman Singapura. Responden mendakwa bahawa perayu terikat dengan prinsip res judicata. Isu yang berbangkit adalah sama ada perayu sepatutnya terikat dengan penghakiman Singapura kerana wang dalam enam akaun deposit tercemar dengan ketidaksahan, dan oleh itu surat sandaran perayu juga tidak sah.

Diputuskan, membenarkan rayuan dengan kos:

(1) Perayu tidak mempunyai tanggungjawab untuk campur tangan dalam permohonan di hadapan hakim Lau Bee Lan kerana pertikaian di hadapan beliau adalah antara responden dan JD dan berkisar pada penghakiman Singapura dalam mana perayu bukanlah pihak. Keduanya, isu atau kausa tindakan antara perayu dan responden adalah berbeza di hadapan beliau. Isu antara perayu dan responden adalah berdasarkan surat penolakan dan tidak melibatkan sama ada JD memegang akaun-akaun garnis sebagai amanah bagi responden. Oleh tu, prinsip res judicata tidak terpakai (lihat perenggan 19).

(2) Perayu bukanlah pihak kepada guaman di Singapura. Tiada sebarang keterangan bahawa perayu sedar bahawa wang dalam enam akaun deposit tersebut adalah rasuah dan diperolehi secara penipuan oleh JD. Dengan itu, perayu berada dalam keadaan 'penerima bona fide bagi nilai dan tanpa notis' dan hak-haknya ke atas wang dalam enam akaun deposit tidak boleh terkesan oleh tindakan salah JD (lihat perenggan 21).

(3) Tiada perundangan atau kes-kes undang-undang yang memerlukan bank-bank seperti perayu untuk menentukan sumber wang yang dibawa

masuk oleh pelanggan-pelanggan mereka. Oleh itu, perayu tidak boleh dikenakan tugas untuk bertanya atau menyiasat sumber wang JD (lihat perenggan 22–23).

(4) Hubungan antara JD dan perayu dibentuk dalam konteks fasiliti perbankan yang diberikan oleh bank kepada pelanggannya dan sebagai sekuriti, JD diperlukan untuk menyandarkan enam akaun depositnya dengan perayu. Niat adalah agak jelas dan iaitu, JD tidak boleh menyingkap enam akaun deposit tersebut sebelum pembayaran penuh semula fasiliti perbankan kecuali perayu bersetuju dengan singkapan tersebut (lihat perenggan 32).

(5) Kepentingan JD dalam enam akaun deposit tersebut tertakluk kepada pembayaran penuh semula fasiliti perbankan, yang mana masih terhutang pada masa material. Oleh itu, dia tidak mempunyai tuntutan ke atas enam akaun deposit tersebut dan apabila responden memikul tanggungjawab JD, ia juga tidak mempunyai hak menuntut wang tersebut (lihat perenggan 33).]

Notes

For cases on security for advances in general, see 1(2) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 2784–2986.

For cases on garnishee proceedings, see 2(2) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 3267–3282.

For cases on res judicata in general, see 2(3) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 7464–7626.

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)

Binamin MJC Quarry Sdn Bhd v Way Soon Construction Sdn Bhd (Enclosure 26) [2001] MLJU 111; [2001] AMEJ 0202, HC (distd)

Chang Yun Tai & Ors v HSBC Bank (M) Bhd and other appeals [2011] MLJU 1479; [2011] 7 CLJ 909, FC (refd)

Kedah Kelang Papan Sdn Bhd v Hansol Sdn Bhd (Teknibina Advisory Services Sdn Bhd, Garnishee) [1988] 1 MLJ 434 (refd)

Official Assignee of Madras v Mercantile Bank of India Ltd [1935] AC 53, PC (refd)

Tay Way Boon & Ors v Omar Marican Holdings Sdn Bhd & Ors [1991] 1 MLJ 122, HC (refd)

Legislation referred to

Reciprocal Enforcement of Judgments Act 1958

Appeal from: Suit No R1–24–01 of 2013 (High Court, Kuala Lumpur)

Ashmadi bin Othman (Zuratul Akmal bt Zubairi and Tan Ru En with him) (Che Mokhtar & Ling) for the appellant.
Dhinesh Bhaskaran (Denise Tan Kae Ji with him) (Shearn Delamore & Co) for the respondent.

David Wong JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal against the decision of the learned High Court judge in which she affirmed the decision of the senior assistant registrar, who had on the application of the respondent, made various garnishee orders absolute.

[2] We heard the appeal and reserved judgment. We now give our decision and grounds.

BACKGROUND FACTS

[3] The appellant had granted banking facilities to the judgment debtor and as part of securities, monies in six fixed deposit accounts ('the six deposit accounts') were pledged with the appellant. The pledge was in a form of a letter of set-off dated 14 June 1999.

[4] Sometime in 2000, the respondent sued the judgment debtor and 29 others in the Singapore High Court relating to a massive fraud perpetrated by the judgment debtor and other defendants on the respondent. The respondent, after a full trial on 30 August 2002, obtained judgment in the sum of US$79m against the judgment debtor ('the Singapore judgment'). The Singapore High Court found as a matter of fact that the judgment debtor was instrumental in the fraud and had accepted bribes of at least US$1.2m from third parties. Those bribes had been mainly deposited in the judgment debtor's accounts in Kuala Lumpur.

[5] The Singapore High Court had also found that the monies in the RHB Bank accounts were held by the judgment debtor on trust for the respondent.

[6] There is no dispute by the appellant that the Singapore judgment referred to and encompassed the six fixed deposit accounts garnished in the appellant and as at 11 March 2004, the monies in the same were in the sum of RM350,447.46.

[7] The Singapore judgment was registered by the respondent on 10 March 2003 in the Kuala Lumpur High Court under the Reciprocal Enforcement of Judgments Act 1958.

[8] On 12 November 2003, the respondent filed an ex parte application (encl 9) naming the appellant as a garnishee for an order that all monies owed by the appellant to the judgment debtor be garnished and be used for payment of the debt due under the Singapore judgment. The aforesaid application was granted in terms on 14 January 2004.

[9] The 14 January 2004 ex parte garnishee order to show cause was served on the appellant together with the supporting affidavit of that application which contained the Singapore judgment. Hence, the appellant was fully aware of that judgment.

[10] On 10 March 2004, presumably in view of the service of encl 9 on it, the appellant in exercise of what they assert to be their right of set-off proceeded to uplift six deposit accounts and utilise the same to pay off the judgment debtor's debt due to the appellant. The appellant had also sold the other charged securities of the judgment debtor and after realising the same, there was a surplus balance of RM67,664.27 which the appellant contends that this is the only amount subject to garnishment.

[11] Enclosure 9 was finally heard by the senior assistant registrar on 8 October 2013 wherein she found in favor of the respondent, resulting in a garnishee order absolute in terms of the application in encl 9.

[12] The appellant then appealed to the High Court wherein the learned judge on 22 October 2013 dismissed the same and the following orders were made:

(a) that the appellant's appeal dated 22 October 2013 against the decision of senior assistant registrar is dismissed;

(b) upon consent by the parties, interest at the rate of 4% awarded by the senior assistant registrar is set aside;

(c) the garnishee order nisi dated 14 January be made absolute; and

(d) the appellant pay to the respondent the followings:

(i) RM350,447.46 (being the amount from the six fixed deposit account set-off by the judgment debtor) as at 13 April 2009;

(ii) RM64,667.27 being the surplus amount after the realisation of all the securities; and

(iii) costs in the sum of RM5000 to the respondent.

[13] It is those orders which are the subject of this appeal. It is to be noted that the orders made by the learned judge had been fully complied with by the appellant without prejudice to this appeal.

[14] We also note that the judgment debtor himself had applied to set aside five of the nine garnishee orders to show cause which included the order against the appellant. The judgment debtor's application was dismissed by senior assistant registrar (15 November 2005) and on appeal, Lau Bee Lan J had on 20 October 2009, dismissed the same as well. An appeal to the Court of Appeal was launched by the judgment debtor but was later withdrawn on 15 February 2012.

HIGH COURT DECISION

[15] From the grounds of the learned judge, there is little doubt that she felt that the Singapore judgment had to be complied with. This can be seen from paragraph iv of her grounds:

> iv. I therefore agree with the JC when its learned counsel cited *Agip (Africa) Ltd v Jackson and Others* [1990] 1 CH 265 at 291 which held as follows:
>
> > *The first concerned with the person who receives for his own benefit trust property transferred to him in breach of trust. He is liable as a constructive trustee if he received it with notice, actual or constructive, that it was trust property and that the transfer to him was a breach of trust; or if he received it without such notice but subsequently discovered the facts. In either case he is liable to account for the property, in the first case as from the time he received the property, and in the second as from the time he acquired notice.* (Emphasis added.)
>
> Therefore, the garnishee holds the monies as constructive trustee for the JC, and is legally obliged to return the monies to the JC. It is for this reason, as submitted by the JC, that *The Law Relating to Banker and Customer in Australia* at paras 3.4260 states that 'there is no right to set off the balance of an account which the bank knows to be a trust account against the customer's indebtedness in other accounts'.

OUR GROUNDS OF DECISION

[16] From the submission of learned counsel for the respondent, he makes two points, namely, the failure on the part of the appellant in intervening in the judgment debtor's application to set aside the garnishee order to show cause and the effect of the Singapore judgment.

[17] In respect of aforesaid failure, learned counsel relies on the judgment of Lau Bee Lan J where Her Ladyship on the same facts and issues found as follows:

> 13. I find the aforesaid contention of the JD as untenable and unsustainable. Firstly, as correctly submitted by the JC, the issue of ownership of the money

in the RHB Bank and RHB Unit Trust accounts whereby after a full trial in which the JD also testified, the Singapore High Court found that (i) the money in the RHB Bank and RHB Unit Trust accounts were held on trust for the JC only and without any set-off; and (ii) Schedule 9 referred to in the Singapore Judgment clearly lists out the numbers of all the JD's accounts with RHB and RHB Unit Trust ...

13.1 Hence I agreed with the JC that the JD is bound by the finding of the Singapore High Court and is estopped from litigating the issue.

[18] Premised on that ruling, learned counsel for the respondent submits that the appellant is bound by the principle of res judicata and refers the court to the case of *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 at pp 197 and 200, where the Federal Court held as follows:

... When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the res judicata, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; res judicata pro veritate accipitur. The public policy of the law is that, it is in the public interest that there should be finality in litigation — interest rei publicae ut sit finis litium ...

... neither of the same parties or their privies in a subsequent proceeding is entitled to challenge the correctness of the decision of a previous final judgment in which they, or their privies, were parties ... neither of such parties will be allowed to adduce evidence or advance any argument to contradict such decision. In this respect, we respectfully agree with Peter Gibson J in Lawlor v Gray [1984] 3 All ER 345 *at p 350, who said: 'Issue estoppel ... prevents contradiction of a previous determination ...'* (Emphasis added.)

[19] With respect, we are unable to agree with submission of learned counsel and our reasons are these. Firstly, the appellant had no duty to intervene in the application before Her Ladyship as the dispute before her was between the respondent and the judgment debtor and was premised on the Singapore judgment which the appellant was not a party. Secondly, the issue or cause of action between the appellant and the respondent is different to that before Her Ladyship. The issue between the appellant and respondent is premised on the letter of set-off and did not concern as to whether the judgment debtor held the garnished accounts on trust for the respondent. Hence, we find that the principle of res judicata does not apply.

[20] There is no doubt that the decisions of the senior assistant registrar, Her Ladyship Lau Bee Lan and the learned judge in this appeal are all premised on what was found by the Singapore High Court that the judgment debtor holds the garnished monies on trust on behalf of the respondent. Those monies were from fraudulent conducts and bribes accepted by the judgment debtor. In other words, they were tainted with illegality.

[21] The question which confronts us is whether the appellant should be bound by the Singapore judgment in that as the monies in the six deposit accounts are tainted with illegality, the appellant's letter of pledge is also tainted. We answer this in the negative and our reasons are these. Firstly, the appellant as mentioned earlier was not a party to that suit. Secondly, there is no evidence whatsoever that the appellant was aware that the monies in the six deposit accounts were from bribes and obtained fraudulently by judgment debtor. That being the case, the appellant can be said that they are in a position of a 'bona fide recipient for value and without notice' and its rights to the monies in the six deposit accounts cannot be affected by the judgment debtor's illegal conducts.

[22] Further, we are not aware of any legislation or case law which requires banks like the appellant here to ascertain as to the source of the monies which their customers bring in. In fact the Federal Court in *Chang Yun Tai & Ors v HSBC Bank (M) Bhd and other appeals* [2011] MLJU 1479; [2011] 7 CLJ 909 at p 920 held as follows:

> [13] The respondent is not a party to the SPA. The SPA is the respective appellant's contract with the developer. Therefore, the duty is cast on the appellants rather than the respondent to ensure that the SPA is free from any legal infirmity. If they have omitted to do so, we are of the view they cannot rely on their default to defeat the respondent's claim to repay their loans. On this point we would cite the case of *Golden Vale Golf Range & Country Club Sdn Bhd v Hong Huat Enterprise Sdn Bhd* [2008] 6 CLJ 31 wherein Gopal Sri Ram, JCA (as he then was) at p 39 had this to say:
>
> If this clause is to be given effect to, it would mean that Airport Auto could rely on its own failure to complete the sale and thereby defeat the defendant's claim for specific relief. It would mean that Airport Auto could rely on its own wrong to its advantage. Settled authority has held that a party cannot rely on its own wrong to defeat its opponent's claim.
>
> [15] It is to be noted the SPA has already been executed before the end financing facilities were granted. Therefore the respondent can presume that the SPA which the appellants had entered into has been ascertained by the appellants to be valid. It would be too onerous to require the respondent to investigate or enquire into a transaction or contract to which they are not a party. Banking business will be rendered impracticable and burdensome if this was so. In this regard the courts should not impose such a requirement that may impede the flow of commerce. On this point Edgar Joseph Jr FCJ in *The Co-operative Central Bank Limited (In Receivership) v Feven Development Sdn Bhd* [1995] 4 CLJ 300 in delivering the judgment of this court cautioned at p 313 as follows:
>
> ... a commercial judge must be anxious about the impact that a decision may have on the proper functioning of the commercial community.

[23] In aforesaid case, it concerned the illegality of the sale and purchase agreements entered by the appellants there and the developer and was premised on the contention that the respondent/bank had a duty to ensure those agreements were proper and valid. The Federal Court held that there was no such duty when the respondent/bank was not a party to those agreements even though financial facility were granted premised on those agreements. Similarly here, the appellant cannot be imposed of such duty to enquire or investigate as to the source of the monies of the judgment debtor. To impose such duty, the whole banking facility would grind to a standstill and hence commercial activities as well.

[24] For reasons stated above, we are of the considered opinion that the learned judge had placed undue importance to the Singapore judgment which has no relevance to what we have before us and that is whether the six deposit accounts are subject to garnishment by the respondent which we now will deliberate.

[25] The starting point of our deliberation must be the letter of set-off dated 14 June 1999 issued by the judgment debtor to the appellant. The two material clauses therein, referred to us by learned counsel for appellant were:

> 3. In consideration of you at my/our request having made making and /or continuing advances and/or otherwise having granted and/or renewing and/or continuing to grant credit and other banking facilities and accommodation to me/us. I/We and my/our heirs, executors, administrators, representatives and/or successors in title hereby as a continuing security for the due and punctual repayment and payment to you of the Secured Amounts charge to you all my rights title and interest in and to the Deposit.
>
> 4. You shall be entitled without prior notice or demand forthwith to set-off and transfer all or any part of the Deposit and apply the same in or towards satisfaction of the Secured Amounts when they actually become due and payable and for that purpose (without prejudice to the generality of the foregoing) to effect such combination of accounts as you think fit.

[26] This letter of set-off was in relation to the acceptance of the appellant's letter of offer (10 June 1999) in respect of overdraft facilities of RM300,000. It is also pertinent to note that the appellant had extended a housing loan facility to the judgment debtor pursuant to an earlier letter of offer dated 23 December 1999.

[27] The parties had also on 29 February 2000 entered into a facilities agreement and the following parts of the default clause therein was also highlighted to us:

13.1 EVENT OF DEFAULT

There shall be an EVENT OF DEFAULT if –

13.1.1 the BORROWER defaults in the payment to the BANK of any amount due under the FACILITY or any part thereof or any other moneys to be paid under the SECURITY DOCUMENTS after the same have become due by the BORROWER to the BANK, whether formally demanded or not;

...

...

13.1.12 any event or events occur or a situation exist which could or might, in the opinion of the BANK prejudice the ability of any SECURITY PARTY to perform its obligations under the relevant SECURITY DOCUMENTS or any part in respect thereof.

...

...

[28] The appellant also referred to us the notice issued to the judgment debtor dated 16 February 2004 which demanded settlement of the outstanding sums under the housing and overdraft facilities and which further stated that in the event of default of such settlement the fixed deposit would be uplifted. This was in the following terms:

TAKE NOTICE that unless you pay to our client or to us as Solicitors for our client the said sums of RM308,780.68 and RM255,457.35 together with our fees of RM52.50 within fourteen (14) days from the date hereof, failing which our client shall have no alternative but to uplift the Fixed Deposit pledged and to proceed with legal action against you for the shortfall without further reference to you.

AND FURTHER TAKE NOTICE pursuant to the terms of the Facilities Agreement our client have exercised their right to combine both the accounts above held by you with our client.

[29] Premised on those paragraphs, learned counsel for the appellant submits that the judgment debtor had assigned his interest in the six deposit accounts to the appellant and upon default of the demand to pay, the appellant was entitled to uplift the fixed deposits. Hence the respondent had nothing to garnish. Learned counsel relies on the case of *Tay Way Boon & Ors v Omar Marican Holdings Sdn Bhd & Ors* [1991] 1 MLJ 122 where it was held that a garnishee cannot attach a debt which had been equitably assigned.

[30] We have no issue with that proposition of law. It is simply based on the principle that the judgment debtor cannot give what he has not got. In other words, the respondent as a judgment creditor steps into the shoes of the judgment debtor as they cannot have a better claim than that of the judgment

debtor against the appellant (see *Official Assignee of Madras v Mercantile Bank of India Ltd* [1935] AC 53).

[31] To determine the nature of the relationship between the judgment debtor and the appellant, we must construe the two documents before us namely the letter of offer and letter of set-off. In construing any commercial contract, courts must construe them in the context of the commercial purpose and surrounding circumstances in which the same came into existence.

[32] In our present case, it is in the context of a banking facility granted by a bank to its customer and as security the judgment debtor was required to pledge his 6 deposit accounts with the appellant. In our view, the intention is quite clear and that is, the judgment debtor cannot uplift the six deposit accounts before the full repayment of the banking facility unless the appellant consents to the uplifting. What that simply means is that the judgment debtor has no right whatsoever to the monies in the six deposit accounts until the secured amount has been fully paid. What we just stated is clear from cl 7 of the letter of set-off which reads as follows:

> 7. Until the Secured Amounts shall have been discharged in full and the Facilities shall cease to be available no part of the Deposit shall be repayable except with your prior written consent (which you may grant conditionally or unconditionally or withhold at your absolute discretion as you think fit).

[33] In short, the judgment debtor's interests in the six deposit accounts are conditional upon the full repayment of the banking facility, which it is not disputed was still owing at the material time. He thus had no claim on the monies in the six deposit accounts and when the respondent steps in his shoes of the judgment debtor, it too had no claim on those monies.

[34] Learned counsel for respondent in his oral submission had relied heavily on the case of *Kedah Kelang Papan Sdn Bhd v Hansol Sdn Bhd (Teknibina Advisory Services Sdn Bhd, Garnishee)* [1988] 1 MLJ 434 and urged us to follow it. The issue which arose in that case was that whether retention money in a construction contract can be garnished. Retention money is money being retained by the developer/garnishee during the works defect period to compensate the garnishee for defect works done by the contractor/judgment debtor. Such retention money is common in the building industry. Lim Beng Choon J found that the retention sum can be garnished despite the non-expiry of the works defect period as in his view those monies had been earned by the judgment debtor for works already done. It is in His Lordship's view a 'debitum in prasesenti' not yet actually payable but nevertheless a debt due which is represented by an existing obligation.

[35] A contrary decision can be found in *Binamin MJC Quarry Sdn Bhd*

v Way Soon Construction Sdn Bhd (Enclosure 26) [2001] MLJU 111; [2001] AMEJ 0202 where the High Court was confronted with the same question of whether retention sum in a construction contract is subject to garnishee proceeding when the defect liability period had not expired. Abdul Aziz Mohamad J (as he then was) was confronted with the rationale propounded in the *Kedah Kelang Papan* and after reviewing other relevant cases concluded that what was held in *Kedah Kelang Papan* was incorrect. This is what His Lordship said:

> In *Kedah Kelang Papan*, Lim Beng Choon J also took the view that the retention sum in question had been earned by the judgment debtor and belonged to him because he had done the work. With respect, I should have thought that even though the judgment debtor had done the work, he would have earned the retention sum only when, at the end of the retention period, his work had been shown to be devoid of defects or he had rectified any defects that nay have been discovered.
>
> To conclude, the retention sum in this case is not debt due or accruing due from TSR to Way Soon. It is meant to be withheld by TSR pursuant to cl 24.1(d) of the subcontracts pending issuance of the certificate of practical completion and finalisation of the account. It is left to be seen how much of that sum, if any, would be available for payment to Way Soon at that stage. There might not be anything left in favour of Way Soon. No part of that sum may be ordered to be presently paid to Binamin, as is their desire in the garnishee proceedings.

[36] With respect to His Lordship in *Kedah Kelang Papan*, we prefer the reasoning in *Binamin MJC Quarry*. The crucial question, which one asks in a garnishee proceeding is simply whether the debt due to the judgment debtor by the garnishee is actionable at the time of application for a garnishee order. It is our view that the learned judge in *Kedah Kelang Papan* paid undue emphasis on the fact that the judgment debtor had earned its retention money without asking the question whether the judgment debtor did have immediate access to that money. The answer is simply no as the ownership of the retention money is subject to a 'clean bill of health' in respect of defects in the construction. Similarly here, the judgment debtor cannot claim ownership or demand for the return of the six deposit accounts from the appellant in view of his pledge of the same for the banking facility.

CONCLUSION

[37] For reasons stated above, we allow the appeal with costs in the sum of RM15,000 for here and below. The orders of the High Court are set aside and we further order that the deposit to be refunded to the appellant.

Appeal allowed with costs.

Reported by Kanesh Sundrum